81-6435

No. _____

RECEIVED
APR 23 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAREY DEAN MOORE,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PAUL L. DOUGLAS
Attorney General

J. KIRK BROWN
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682

Attorneys for Respondent.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Supreme Court of the State of Nebraska's interpretation of Neb.Rev.Stat. §29-2521.03 (Reissue 1979) violate the Eighth and Fourteenth Amendments.

Respondent accepts the petitioner's remaining statements of issues presented.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Summary of Argument	1
Argument:	
I. It is the duty of the Nebraska courts to interpret Nebraska statutes.	1
II. The present system for state appellate review of sentences of death imposed under Nebraska statutes adequately provides the level of review required for the proper imposition of a sentence of death under the Eighth and Fourteenth Amendments.	1
III. The language of the aggravating circumstances challenged here is not unconstitutionally vague.	2
IV. The penalty phase findings of fact relied upon by the reviewing state appellate court in affirming this sentence of death are supported by the record.	4
Conclusion	5
Certificate of Service	6

TABLE OF CITATIONS

Page

Cases Cited

Godfrey v. Georgia, 446 U.S. 420 (1980)---------- 2,3

State v. Moore, 210 Neb. 457, 476, 316 N.W.2d 33 (1982)---------- 2,3,4

Statutes Cited

Neb.Rev.Stat. §29-2521.03 (Reissue 1979)---------- 1

SUMMARY OF ARGUMENT

1. It is the duty of the Nebraska courts to interpret Nebraska statutes.

2. The present system for state appellate review of sentences of death imposed under Nebraska statutes adequately provides the level of review required for the proper imposition of a sentence of death under the Eighth and Fourteenth Amendments.

3. The language of the aggravating circumstance challenged here is not unconstitutionally vague.

4. The penalty phase findings of fact relied upon by the reviewing state appellate court in affirming this sentence of death are supported by the record.

ARGUMENT

I.

IT IS THE DUTY OF THE NEBRASKA COURTS TO INTERPRET NEBRASKA STATUTES.

The petitioner first complains that the Supreme Court of the State of Nebraska has improperly interpreted Neb.Rev.Stat. §29-2521.03 (Reissue 1979) [Nebraska Laws 1978, LB 711]. It is the duty of the court system of every state to interpret that state's legislative enactments. In no respect does the responsibility for the correct interpretation of state statutes fall to this court. The petitioner states no basis for the granting of the relief requested in this particular issue.

II.

THE PRESENT SYSTEM FOR STATE APPELLATE REVIEW OF SENTENCES OF DEATH IMPOSED UNDER NEBRASKA STATUTES ADEQUATELY PROVIDES THE LEVEL OF REVIEW REQUIRED FOR THE PROPER IMPOSITION OF A SENTENCE OF DEATH UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The next question is whether the state court's interpretation of Neb.Rev.Stat. §29-2521.03 (Reissue 1979) has led to a constitutionally unacceptable imposition of a sentence of death in this case. We do not believe that it has.

In reviewing the necessary procedures for the imposition of such a penalty the Nebraska court noted:

> LB 711 thus construed is coextensive with our duty under the federal Constitution, under our own state Constitution, and under the statutory provisions for automatic review to determine in the death penalty cases which come before us whether the provisions of §29-2523 are properly applied, and to assure the death penalty is not arbitrarily and capriciously imposed.

State v. Moore, 210 Neb. 457, 476, 316 N.W.2d 33 (1982).

> Our reading of Godfrey [v. Georgia, 446 U.S. 420 (1980)] does not lead us to an understanding that an isolated, unappealed trial court judgment is to be the standard by which all other sentences must be judged. The U.S. Supreme Court's purpose in that case was to mandate the death penalty not be inflicted arbitrarily and capriciously.

Id. 210 Neb. at 478-479.

The state court has correctly ascertained what is mandated by the Eighth and Fourteenth Amendments. In so doing, they have shown appropriate deference to the Eighth and Fourteenth Amendment rights of the petitioner in affirming his sentence of death. The petitioner raises no basis for the relief sought here on this issue.

III.

THE LANGUAGE OF THE AGGRAVATING CIRCUMSTANCES CHALLENGED HERE IS NOT UNCONSTITUTIONALLY VAGUE.

The petitioner next argues that the finding regarding one of the statutory aggravating circumstances found applicable to him is contrary to this court's holding in Godfrey v. Georgia, supra. The state appellate court set forth its interpretation of the aggravating circumstances here in question as follows:

> The U.S. Supreme Court in Godfrey did not overrule its previous holding in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The language of the Georgia statute, §27-2534.1(b)(7), was not unconstitutional on its face. Aggravating circumstance (1)(d) of §29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture,

> sadism, or the imposition of extreme suffering exists. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In State v. Stewart, supra, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft or regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

State v. Moore, supra, 210 Neb. at 470-471. Again, this analysis shows appropriate concern for the problems noted by this court in Godfrey v. Georgia, supra. We are aware of no constitutional infirmity in the facts which constitute a particular type of criminal offense, e.g., capital murder, also describing a statutory aggravating circumstance. Nebraska statutes do not impose the death penalty automatically upon any person convicted of capital murder, nor does a conviction for capital murder mandate a finding by the sentencing entity that the aggravating circumstance here in question is applicable. The fact that the actions of a capital murderer may require a finding that this aggravating circumstance is present implies nothing more than the fact that such crimes often offend all standards of morality and intelligence.

We are commanded by the Constitution to reasonably classify homicides and to distinguish the many murderers who

do not "deserve" the penalty of death from the few who do. The petitioner should not be heard to complain simply because he has been reasonably classified as being among the few upon whom this penalty may be imposed. The test should not be that only a few of the most depraved killers should receive the death penalty. All reasonably found to be members of this class are appropriately subject to a sentence of death. The test is to reasonably distinguish the many whose acts of homicide are not as depraved as those of the petitioner from the few which are similar in nature.

IV.

THE PENALTY PHASE FINDINGS OF FACT RELIED UPON BY THE REVIEWING STATE APPELLATE COURT IN AFFIRMING THIS SENTENCE OF DEATH ARE SUPPORTED BY THE RECORD.

The petitioner also claims that there exists no factual basis for the sentencing entity's finding that, to the petitioner "human life in the middle years is less valuable than a younger life." State v. Moore, supra, 210 Neb. at 471. That claim is unfounded. The petitioner's own words establish this fact.

Submitted as evidence at the petitioner's trial were two recorded confessions made by the petitioner to police officers (Exhibits 61 & 62). In Exhibit 61, the petitioner's confession to the Van Ness murder, the following dialogue took place:

> Q. Why did you go to the Smoke Pit and order the cab?
>
> A. Because I wanted to make sure that the guy wasn't that young.
>
> . . .
>
> Q. What was your plan then? I mean, to see an old guy and then you were going to rob him or what?
>
> A. Right.
>
> . . .
>
> Q. Why did you decide that that [Van Ness] was the one?
>
> A. He wasn't too young.

In Exhibit 62, the petitioner's confession to the Helgeman murder, the following dialogue took place:

> Q. When you went to the cab, how come you singled out this cab that you eventually got in, how come you decided to take that cab?
>
> A. It was an older guy, kind of.
>
> . . .
>
> Q. Why do you pick out the older men to shoot?
>
> A. I don't know. It's slightly easier for me to do it. If it's a young guy, around my age, I couldn't do it. I don't think so at least.

See also, 1019:18-1021:7.

Certainly this is sufficient evidence for the court's conclusion that the petitioner valued the lives of older men less than the lives of younger men. In view of the evidence submitted at petitioner's trial the court was justified in its conclusion.

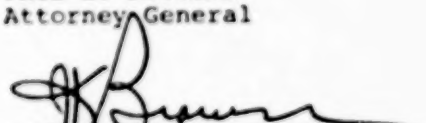
CONCLUSION

The petitioner has failed to establish any basis for the relief requested.

Respectfully submitted,

STATE OF NEBRASKA, Respondent,

By PAUL L. DOUGLAS
Attorney General

By 

J. Kirk Brown
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682

Attorneys for Respondent.